UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	)	CHAPTER 13
	)	
FREDERICK MICHAEL BALLEW	)	CASE NO. 03-61500-MHM
	)	
Debtor	)	
	)	
	)	
FREDERICK MICHAEL BALLEW	)	
	)	
Plaintiff	)	
	)	**ADVERSARY PROCEEDING**
v.	)	**NO. 03-6184**
	)	
BRENDA SMITH	)	
	)	
Defendant	)	

O R D E R

This matter is before the Court on Plaintiff's Motions for Entry of Default Judgment and to Strike Late Filed Answer with Brief Combined (the "Motion for Default Judgment") and Motion for Summary Judgment, and Defendant's Motion for Summary Judgment. For the reasons set forth below, the Plaintiff's Motions for Default Judgment and Motion for Summary Judgment will be denied; and Defendant's Motion for Summary Judgment will be denied.

STATEMENT OF MATERIAL FACTS

This adversary proceeding arises from Defendant's prepetition judgment lien against Plaintiff's real property. Plaintiff, Frederick Michael Ballew (the respondent in the child support proceedings), and Defendant, Brenda Smith, were divorced March 14, 1991. The Final Judgment and Decree of Divorce provided that Plaintiff would pay Defendant $ 80 per week as child

support. On September 20, 1995, the Superior Court of Clayton County entered an Order of Contempt against the Plaintiff finding him to be in arrears for child support in the amount of $ 7,060.39. The order also commanded Plaintiff to pay $500 by October 20, 1995, and to pay, in addition to his scheduled monthly payments, $30 per month toward the arrears. On May 28, 1997, an order was entered by the Superior Court of Clayton County, in which the court held that neither Plaintiff nor Defendant, who had filed a counter motion for contempt, had met their burdens of proof with respect to contemptuous conduct (the "1997 Order"). Then, on April 15, 1999, the Superior Court of Lumpkin County entered an Order of Contempt declaring Plaintiff to be in arrears for child support payments in the amount of $4,320.00. The order stated that this amount excluded the amount provided for in the order of the Clayton County Superior Court. Similar to the order entered in Clayton County, the order provided that Plaintiff would pay, in addition to his regular child support payments, $12.50 per week toward the arrearage; and established certain payments to be made to the Child Support Enforcement Unit.

On June 17, 2002, the Superior Court of Clayton County issued a writ of *fieri facias* (the "Writ") against Plaintiff in the amount of $34,835.79. As allowed by Georgia law, the Writ was based upon an affidavit from Defendant's attorney regarding the arrearages in Plaintiff's child support payments. The Writ was recorded August 5, 2002, in the public records of both the Superior Court of Clayton County and the Superior Court of Fannin County. Thereafter, the Sheriff of Fannin County levied against property owned by the Plaintiff located in Fannin County. After learning of the pending judicial sale, Plaintiff sought and received an injunction and temporary restraining order issued by the Superior Court of Fannin County to stop the levy and judicial sale until a hearing could be held to determine the amount of arrearage in child support payments.

On January 31, 2003, Plaintiff filed a Chapter 13 bankruptcy petition in Northern District of Georgia. Plaintiff seeks a determination of the validity and extent of the lien held by Defendant pursuant to the writ of fieri facias. Plaintiff contends that he does not owe Defendant more than $5,087.00 in unpaid child support. Defendant seeks to have the arrearage of child support payments set at $31,931.76. Defendant has also included in her motion for summary judgment arguments regarding the dischargeability of Plaintiff's child support obligation under to 11 U.S.C. § 523(a)(5). As a preliminary matter, however, Plaintiff's Motion for Default Judgment, which was filed contemporaneously with his Motion for Summary Judgment, will be addressed.

DEFAULT JUDGMENT

On April 11, 2003, a summons in this adversary proceeding (the "Summons") was issued commanding Defendant to file and serve an answer or response to the complaint within 30 days of issuance of the summons. In accordance with Rule 7004(b) of the Federal Rules of Bankruptcy Procedure, Plaintiff served a copy of the complaint and the summons on the Defendant by regular first class United States mail, postage prepaid, April 14, 2003. Rule 7012 of the Federal Rules of Bankruptcy Procedure requires a defendant to "serve an answer within 30 days after the issuance of the summons," which would have been May 12, 2003 (May 11, 2003 was a Sunday. *See* Bankruptcy Rule 9006(a)).

Defendant failed to file an answer in this adversary proceeding until August 25, 2003. Prior to the filing of Defendant's answer, on July 10, 2003, Plaintiff moved for an entry of default. The Clerk issued an entry of default July 11, 2003. Defendant's Answer contained an allegation that Plaintiff's attorney had consented to the late filing of the Answer. Defendant filed

a Motion to Extend Time to File a Response ("Motion to Extend Time") October 10, 2003, which also alleged the consent of Plaintiff's attorney.

An order denying Defendant's motion as procedurally improper was entered on November 4, 2003. That order acknowledged that Defendant had presented a consent order signed by Plaintiff's attorney but concluded that, because Plaintiff had obtained the Clerk's entry of default, a simple motion to extend time was insufficient to provide complete relief to Defendant. Defendant failed to file any further motion regarding the late answer. Although Defendant's attorney has failed to correct his procedural error, nevertheless Plaintiff's attorney consented to the late filing of Defendant's answer. Plaintiff will not now be heard to argue that Defendant's answer should be stricken as untimely and default judgment granted. Therefore, Plaintiff's Motion for Default Judgment is denied.

MOTIONS FOR SUMMARY JUDGMENT

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, made applicable by Rule 7056 of the Federal Rules of Bankruptcy Procedure, summary judgment is authorized when all the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits show that no genuine issue as to any material fact exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *see also Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 252 (1986); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). In assessing whether a "genuine issue" for trial exists, the court must consider all the evidence and factual inferences reasonably drawn from the evidence in a light most favorable to the nonmoving party. *Stewart v. Booker T. Washington Ins.*, 232 F.3d 844, 850 (11th Cir. 2000). "The party seeking summary judgment bears the initial burden to demonstrate to the court the basis for its motion for summary judgment

and identify those portions of the pleadings, depositions, answers to interrogatories, and admissions which it believes show an absence of any genuine issue of material fact . . . . If the movant successfully discharges its burden, the burden then shifts to the non-movant to establish, by going beyond the pleadings, that there exist genuine issues of material facts." *Hairston v. Gainesville Sun Publishing Co.*, 9 F.3d 913, 918 (11th Cir. 1993), *reh'g denied*, 16 F.3d 1233 (11th Cir. 1994). The non-movant may not simply rest on his pleadings but must show, by reference to affidavits or other evidence, that a material issue of fact remains. Fed. R. Civ. P. 56.

COLLATERAL ESTOPPEL

Relying on principles of collateral estoppel, Plaintiff argues that, as a matter of law, Defendant is prohibited from including as part of her claim any child support owing prior to the 1997 Order. Collateral estoppel serves to prevent the relitigation of issues previously contested and determined by a valid and final judgment in another court. *HSSM #7 Ltd. Pshp. V. Bilzerian (In re Bilzerian)*, 100 F.3d 886, 892 (11th Cir. 1996). The doctrine of collateral estoppel -- also known as "issue preclusion" -- provides that a judgment forecloses relitigation of any issue that has been actually litigated and decided. *Hart v. Yamaha-Parts Distributors, Inc.,* 787 F.2d 1468, 1473 (11th Cir. 1986); *Migra v. Warren City School Dist. Bd. Of Education,* 456 U.S. 75, 77n. 1, 104 S. Ct. 892, 894n. 1, 79 L. Ed. 2d 56 (1984). The doctrine of collateral estoppel applies in bankruptcy proceedings. *See Grogan v. Garner,* 498 U.S. 279, 284 n. 11, 111 S. Ct. 654, 658 n.11 (1991); *see also St. Laurent, II v. Ambrose (In re St. Laurent, II),* 991 F.2d 672, 675-76 (11th Cir. 1993).

In applying the doctrine of collateral estoppel to state court judgments, a federal court must accord the judgment the same preclusive effect as would be given that judgment under the

law of the State in which the judgment was rendered. *Kremer v. Chemical Construction, Corp.,* 456 U.S. 461, 102 S.Ct. 1833, 72 L.Ed.2d 262 (1982); *Allen v. McCurry,* 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980); *St. Laurent, II v. Ambrose (In re St. Laurent, II),* 991 F.2d 672, 675-76 (11th Cir. 1993). In order for the doctrine of collateral estoppel to be applied, Georgia law requires: "(1) identity of parties or their privies; (2) identity of issues; (3) actual and final litigation of the issue in question; (4) essentiality of the adjudication to the earlier action; and (5) full and fair opportunity to litigate the issues in question." *Lusk v. Williams (In re Williams),* 282 B.R. 267, 272 (Bankr. N.D. Ga. 2002); *see also Kent v. Kent,* 265 Ga. 211 452, S.E.2d 764 (1995).

No identity of issues exists between the present case and the contempt proceeding. Contempt is part of a court's inherent power to enforce its orders. DAN E. MCCONAUGHEY, GEORGIA DIVORCE, ALIMONY, AND CHILD CUSTODY §§ 14-1, 14-2 (4th ed. 2004); *see also Brown v. King,* 266 Ga. 890, 472 S.E.2d 65 (1996). In a contempt proceeding for nonpayment of child support, the court must find that the respondent not only failed to comply with the prior order, but that the failure to comply was "willful." MCCONAUGHEY, *supra; see also Kent v. Kent,* 265 Ga. 211, 452 S.E.2d 764 (1995); *Edwards v. Edwards,* 224 Ga. 224, 160 S.E.2d 830 (1968). In contrast, the issue in the present case is the validity and extent of the lien created by the Writ, i.e. the amount of unpaid child support. Under Georgia law, each installment required by an order to pay child support is, on and after the date each installment is due (in this case, $80 every week), a judgment by operation of law. O.C.G.A. § 19-6-17. Moreover, the clerk of court is required to issue a writ of *fieri facias* on request of the custodial parent or her attorney as a matter of right. MCCONAUGHEY, *supra* § 14-9; *see also Stephens v. Stephens,* 171 Ga. 590, 156 S.E. 188 (1930);

Brookins v. Brookins, 257 Ga. 205, 357 S.E.2d 77 (1987). The custodial parent is not required to obtain a new judgment from the court for the purpose of obtaining the writ of fieri facias. *Id.* The issues in the present case are limited to whether the Writ was issued in accordance with Georgia law and whether the amount of the lien accurately represents the amount of the unpaid child support. Collateral estoppel does not apply where the issues are merely similar, but not identical. *See I.A. Durbin, Inc. V. Jefferson Nat'l Bank,* 793 F.2d 1541, 1550 (11th Cir. 1986).

Defendant presents an argument in her Motion for Summary Judgment that her claim against Plaintiff should be declared nondischargeable under 11 U.S.C. § 523(a)(5). The issue of dischargeability, however, was not raised in either Plaintiff's complaint nor Defendant's answer. Plaintiff does not appear to contest that the unpaid prepetition child support is nondischargeable. Plaintiff appears to contest only the amount of the obligation. Therefore, dischargeability is not an issue properly before the court.

Plaintiff argues in his response to Defendant's motion for summary judgment that Defendant's motion was untimely. Defendant, however, has provided an adequate explanation for the delay in filing the motion. Moreover, the delay of only four days was not prejudicial to Plaintiff. Therefore, Plaintiff's argument is without merit.

AMOUNT OF UNPAID CHILD SUPPORT

Neither party has provided sufficient evidence to determine the amount of arrearage remaining. An itemized list of payments due and payments made was provided for the years of 1997 to 2002, but the parties failed to provide similar documentation for child support for the years 1995 and 1996. Additionally, the contempt orders produced by the parties provide for

payments to be made to cure the arrearage. The parties failed to provide any evidence of those payments (if made, how much was paid?). Accordingly, it is hereby

ORDERED that Plaintiff's Motion for Default Judgment is **DENIED**. It is further

ORDERED that Plaintiff's Motion for Summary Judgment is **DENIED**. It is further

ORDERED that Defendant's Motion for Summary Judgment is **DENIED**.

IT IS SO ORDERED, this _____ day of October, 2005.

_____
MARGARET H. MURPHY
UNITED STATES BANKRUPTCY JUDGE